Message

From: Jackson, Laurianne [Jackson.Laurianne@epa.gov]
Sent: 9/30/2015 3:56:38 PM
To: Abendschan, Sharon [Abendschan.Sharon@epa.gov]
Subject: FW: CoCa - Nelson Tunnel Settlement (DJ # 90-11-3-10841)
Attachments: ATP - Corporation(2013).pdf; DENVER-#522466-v1-Nelson_Tunnel_Fourth_Tolling_Extension_with_Hecla_Entities.DOCX

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From: Ellington, Jerry L (ENRD) [mailto:Jerry.L.Ellington@usdoj.gov]
Sent: Tuesday, September 29, 2015 3:54 PM
To: Elizabeth Temkin
Cc: Jackson, Laurianne
Subject: RE: CoCa - Nelson Tunnel Settlement (DJ # 90-11-3-10841)

Betsy:

I met with EPA this morning regarding the proposed settlement with CoCa Mines at the Nelson Tunnel/Commodore Waste Rock Pile Site. We discussed your requests that we: (1) broaden the covenant not to sue (CNTS) to include Creede Resources, Inc. ("CRI") as a past owner under Section 107(a) of CERCLA; and (2) add a covenant not to sue the settling defendants under Section 402 of the Clean Water Act (CWA) for past and on-going point source discharges of acid mine drainage from the Nelson Tunnel.

As to the first point, for us to provide a CNTS to CRI as a past owner in its own right we will need basic financial ability to pay information from CRI as set forth in the attached ATP document. Please note that we do not expect CRI's ownership of the former Emperius Mill site will be an impediment to an ATP settlement. So unless CRI has other significant assets, or there has been a diversion of significant assets, we expect to be able to conclude the settlement based upon the current proposed financial terms. I would also note that based upon the documents attached to your Sept. 28 email, CRI arguably became an owner at the site on July 17, 1989. That extended for less than 3 months to October 6, 1989, when Hecla terminated the Mining Lease with the Poxson entities. We are not aware of any mining operations by CRI, or any entity affiliated by CRI, at the Site during this short period of time. So we question the need to extend the CNTS to CRI in its own right. Should CRI still want to pursue such a CNTS, we will commit to conducting an expedited review of ATP information CRI submits to us.

As to the second point, the three cases you cited are inapposite. None address whether injunctive relief under Section 402 of the CWA can be had against a former owner/operator of a facility having a point source discharge, by which the former owner/operator is be required to obtain an NPDES permit for an on-going point source discharge, and comply with the requirements of the NPDES permit into the future, at a facility the

past owner/operator no longer has access to or controls. *Telluride* was a CWA Section 404 case. The issue there was whether a claim for injunctive relief, in the form of a mitigation project to off-set environmental harm caused by a past owner/operator having violated Section 404 of the CWA, was time barred under 28 U.S.C. § 2462, the general five-year statute of limitations applicable to enforcement of any civil fine, penalty, or forfeiture. The CA 10 held no, the claim was not time barred. But note, the mitigation project could have been completed anywhere, was specifically to offset past environmental harm, and did not involve obtaining a permit impacting an on-going point source discharge for a facility owned and operated by another person or entity. *Sea Bay* was also a CWA Section 404 case, and is in accord with *Telluride*. The *San Francisco Baykeeper* case was brought by a citizen's group under CWA Section 402, and was limited to civil penalties for alleged past violations of a general NPDES permit by a former owner/operator of the facility, which claims were not time-barred. We have yet to find any case law supporting the notion that a wholly past owner/operator of a facility/point source discharge could years later be required to obtain, and into the future comply with, an NPDES permit for the same facility now owned/operated by someone else and over which the past owner/operator no longer has any control. We will continue to discuss this internally. Meanwhile, if you have any other precedent you would like us to consider, please let me know. That said, I would note that we do believe CERCLA provides the government the means of pursuing a claim requiring a past owner/operator of a facility to address an on-going point source discharge, and that CERCLA could be the basis of a claim by a current owner/operator of a facility having a point source to seek contribution from a past owner/operator. Those potential claims are, however, already addressed by the draft Consent Decree we sent you.

Finally, it is obvious we are going to need more time to sort all this out. I am therefore attaching another 6-month tolling extension. I'm happy to limit this to 3-months if you would prefer that we shorten the time period. As the current tolling period expires on October 14, please promptly confirm that your client will agree to this extension. Otherwise, I will need to be prepared to file on October 14, and workaround a potential government shut-down.

Regards,

Jerry

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From: Elizabeth Temkin [mailto:temkin@twhlaw.com]
Sent: Monday, September 28, 2015 5:21 PM

To: Ellington, Jerry L (ENRD) <JEllington@ENRD.USDOJ.GOV>; Jackson, Laurianne <Jackson.Laurianne@epa.gov>
Subject: CoCa - Nelson Tunnel

Greetings,

The first two attachments to this email are the assignments supporting inclusion of Creede Resources as a Settling Defendant Related Party under the CD. By the time of these assignments, CoCa had wrapped up all its exploration activities, so CRI never operated at the Site. But it was arguable an "owner" for a period of time of certain leasehold and other interests before those interests were released. On the ability to pay question as to CRI, I am not aware of any rule or precedent, including under the Ability to Pay Guidance, that an ability to pay analysis must be performed as to Settling Defendant Related Parties. If that were the case, both deals fail, as no analysis has been done for the Gilt Edge or Nelson Tunnel sites on Hecla Limited's ability to pay and that analysis would not likely result in an ATP determination as to these two sites.

The third attachment, the EPA's map of the site and its boundaries, is all that really should be necessary to establish that the Nelson Tunnel is the quintessential point source. While there currently are no cases finding past owners in this precise situation liable under the Clean Water Act for penalties or injunctive relief, the language in the statute is not specifically tied to current owners and operators and therefore ambiguous in that regard, whatever DOJ practice has been to date. As we discussed last week, a CWA claim for injunctive relief is not barred by the statute of limitations, *United States* v. *Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) and a restorative injunctive may be appropriate even if the alleged violation is wholly passed. *Id.* at 1246-47. *See also United States* v. *Sea Bay Development Corp.* 2007 WL 1378544 (E.D. Va. May 8, 2007), finding that control of the property in question was not a prerequisite for imposition of either a prohibitive or mitigating injunction. Courts have also been willing to impose penalties on prior operators after they no longer own the property. *See*, e.g, *San Francisco BayKeeper, Inc.* v. *Tosco Corp.*, 309 F. 3d 1153 (9th Cir. 2002). For all these reasons, in this unusual circumstance, the covenant should include Clean Water Act Sections 309 and 504 and state law equivalents, so that covenant in fact does protect CoCa and the Related Parties from future claims for response costs, injunctive relief or penalties based on pre-CD activities.

My plan is to get the redlines of the CDs to you and Heidi, respectively, this week.

Betsy

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